Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

NORMAN G. BAKER, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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(b) OPINIONS DELIVERED BELOW.

This case apparently will not be reached for hearing by the Tenth Circuit Court of Appeals until the May Term, 1944. No opinion therefore has been rendered by the Circuit Court of Appeals.

The opinion of Circuit Judge Huxman, sitting as the District Court of Kansas, appears in the record, pages 31 to 34.

(c) STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

This is a case pending in the Circuit Court of Appeals for the Tenth Circuit and comes within the specific provisions of Section 240a of the Judicial Code as amended. F. C. A., Title 28, Sec. 347.[1]

(d) STATEMENT OF THE CASE.

The case stated in the Petition for Certiorari, pages 1, 2 and 3, is made a part of this brief by reference. The facts in brief are:

Petitioner was tried and found guilty of violation of the postal laws in January, 1940, in the United States District Court at Little Rock, Arkansas. On January 25, 1940, the court overruled motion for new trial and entered judgment sentencing Petitioner to pay a fine of $4,000 and to be committed to the custody of the Attorney General for

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[1]Sec. 347, Title 28, F. C. A.:

"(a) **In any case,** civil or criminal, **in** a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either **before** or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. * * *"

imprisonment for four years in an institution of the penitentiary type. This judgment contained an order that a **certified copy** thereof should be given to the marshal **to serve as a commitment. No other commitment was ever issued** (Rec. 15).

On **January 25, 1940,** in execution of that commitment, the marshal incarcerated Mr. Baker in the county jail at Little Rock **"to await transportation to the penitentiary"** at Leavenworth, and Petitioner as a matter of law **thereby commenced** the service of his sentence in accordance with Section 709a of Title 18 of the United States Code.

On the next day, January 26, 1940, Petitioner perfected his appeal to the United States Circuit Court of Appeals for the Eighth Circuit. The District Court thereafter denied his application for allowance of bail (Rec. 7).

On January 31, 1940, six days after service of his sentence had commenced in the county jail and while it still continued, Petitioner signed and gave to the marshal the so-called election, Exhibit II (Rec. 18). Imprisonment in jail under the original commitment was continued until March 22, 1941, when the marshal delivered Petitioner to the United States penitentiary at Leavenworth, Kansas, as shown by his return upon the commitment, Exhibit A of the complaint (Rec. 14). The Circuit Court of Appeals affirmed the judgment of the lower court on November 20, 1940, denied petition for rehearing, and on March 13, 1941, issued its mandate to the lower court (Ex. B of complaint), which was filed in the United States District Court at Little Rock on March 15, 1941 (Rec. 16).

While the appeal was pending Petitioner at all times persisted in his right to be admitted to bail and made four applications to the Circuit Court of Appeals for the Eighth Circuit to be admitted to bail (Rec. 7). The appeal was

not frivolous but substantial questions were raised and considered by the Circuit Court of Appeals, including plain error in submitting to the jury issues having no support in the evidence, error in refusing to admit competent evidence to show good faith, misconduct of the United States Attorney, and many others (Rec. 8). His applications were denied by that Court respectively on March 25th, April 22nd, June 24th and October 8th, 1940 (Rec. 7).

No order was made at any time by either the lower court or the Circuit Court of Appeals **to recall the commitment nor to stay** the execution thereof. Petitioner is still being held prisoner in the penitentiary at Leavenworth by Respondent under said original commitment. No other commitment was ever issued against him for either detention or imprisonment (Rec. 12).

Petitioner did not request nor consent to, nor in any way bring about, his delivery to the county jail at Little Rock for detention, but at all times insisted upon his right to be admitted to bail (Rec. 7), although after six days' service of sentence he did sign a so-called election (Ex. II, Rec. 18).

With allowance of seven days per month for each month of his service provided by Section 710 of Title 18, of the United States Code for good behavior, Petitioner had served the full time required by law on the 23rd day of February, 1943.

No charges of misconduct or violation of the rules were made against Petitioner and no punishment of any kind inflicted on him for violation of the rules or for misconduct up to that time, and he acquired a vested right to this good time allowance of 336 days in all. Subtracting that from the four year period from January 25, 1940, to January 25, 1944, made Petitioner's sentence expire on February 23, 1943.

By express terms of the statute, Section 710 of Title 18, the time allowance for good behavior is to be estimated **"commencing on the first day** of his arrival at the **penitentiary, prison or jail** * * * upon a sentence of not less than five years, seven days for each month."

This allowance is made to any prisoner who "is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail or in any penitentiary, prison, or jail of any state or territory, for a definite term other than life," etc.

(e) SPECIFICATION OF ERRORS ASSIGNED.

The petition contains a statement of the Questions Presented, page 4, which for brevity is made a part of this brief for reference.

As the Tenth Circuit Court of Appeals has not heard nor decided the case, no errors can be assigned relative to its action. We shall attempt to comply with Rule 27 by assigning errors as follows:

1. The District Court erred in holding that Appellant was not entitled to credit upon his four years' sentence for the year and two months imprisonment in the county jail after service of his sentence commenced by his being imprisoned in said jail to await transportation to the penitentiary.

2. The District Court erred in holding that Rule V of the rules of the Supreme Court for procedure in criminal cases after verdict in district courts of the United States, was valid and in failing to hold that said rule was void; because

a. It embraced a matter of substantive law which only Congress had constitutional authority to enact.

b. The express terms of Sec. 688 of Title 18, of F. C A., provided that

> "The rules made as herein authorized may prescribe the times for and the manner of taking appeals and applying for writs of certiorari and preparing bills of exceptions and records **and the conditions on which supersedeas or bail may be allowed.**"

and thereby **implicitly withheld** from the Supreme Court the power to make rules for staying execution of sentence in any other way than by prescribing "the conditions on which supersedeas or bail may be allowed."

(f) SUMMARY OF THE ARGUMENT.

Rule V of the Rules of the United States Supreme Court for Criminal Cases After Verdict, is unconstitutional and void for it embodies matters of substantive law which Congress had no power to delegate to the Supreme Court. This is an important constitutional question which should be settled by this Court.

U. S. v. *Hudson,* 65 Fed. Rep. 68.

Erie v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

Wayman v. *Southard,* 10 Wheat. 1, 6 L. Ed. 253.

Springer v. *Philippine Islands,* 277 U. S. 189, 72 L. Ed. 845.

Article I of the United States Constitution vests all legislative Power in Congress.[2]

Panama Refining Co. v. *Ryan,* 293 U. S. 388, 79 L. Ed. 448.

U. S. v. *Hudson,* 65 Fed. Rep. 68.

Springer v. *Philippine Islands,* 277 U. S. 189, 72 L. Ed. 845.

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[2]"Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Eisner v. *Macomber*, 252 U. S. 189, 64 L. Ed. 521.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed 516.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 397, 84 L. Ed. 1263-1273.

Opp. Cotton Mills v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624.

It is well settled that substantive laws can be enacted only by Congress and Congress cannot delegate to the Supreme Court power to enact substantive laws in the guise of prescribing rules of procedure.

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 79 L. Ed. 448.

U. S. v. *Hudson*, 65 Fed. Rep. 68.

Williamson v. *U. S.*, 207 U. S. 425, 52 L. Ed. 278.

Lynch v. *Tilden Produce Co.*, 265 U. S. 315, 68 L. Ed. 1034.

Great Lakes Hotel Co. v. *Comm.*, 30 F. 2d 1.

Griswold v. *U. S.*, 36 F. Supp. 714.

U. S. v. *Eaton*, 144 U. S. 677, 36 L. Ed. 591.

U. S. v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571, 24 L. Ed. 491.

Sibbach v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 397, 84 L. Ed. 1263, 1273.

Opp. Cotton Mills v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624.

Carter v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

The line between substantive law and procedural rules is hazy and the distinction between them is difficult and delicate and requires clarification by this Court.

Erie v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.
Wayman v. *Southard*, 10 Wheat. 1, 6 L. Ed. 253.
Keary v. *Farmers and Mer. Bank*, 16 Pet. 89, 10 L. Ed. 897.
Beers v. *Haughton*, 9 Pet. 329, 9 L. Ed. 145.
Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196.
Central Vermont R. Co. v. *White*, 238 U. S. 507, 59 L. Ed. 1433.
Continental Casualty Co. v. *U. S.*, 314 U. S. 527, 86 L. Ed. 426.
Kring v. *Mo.*, 107 U. S. 221, 27 L. Ed. 506.

Sec. 688, Title 18, F. C. A., did not authorize the Supreme Court to provide by rule for stay of execution of judgment for imprisonment in any way other than by allowance of bail.

Durousseau v. *U. S.*, 6 Cranch 307, 3 L. Ed. 232.
U. S. v. *Arredondo*, 6 Pet. 691, 8 L. Ed. 547.
Stephens v. *Smith*, 10 Wall. 321, 19 L. Ed. 933.
Raleigh and G. R. Co. v. *Reid*, 80 U. S. 269, 20 L. Ed. 570.
Ford v. *U. S.*, 273 U. S. 593, 71 L. Ed. 793.
U. S. v. *Barnes*, 222 U. S. 513, 56 L. Ed. 291.
Neuberger v. *Comm.*, 311 U. S. 83, 85 L. Ed. 59.
White v. *Burke*, 43 F. 2d 329.
Continental Casualty Co. v. *U. S.*, 314 U. S. 527, 86 L. Ed. 426.
Roberts v. *U. S.*, 88 U. S. L. Ed. Adv. Op. 69.

The flagrant violation of Petitioner's constitutional right to liberty by continued imprisonment after service of the full term of his sentence, is an urgent reason why

this Court should not permit relief to be delayed by requiring Petitioner to prosecute his appeal to the Circuit Court of Appeals and await its decision in the ordinary course of its procedure. Such delay in itself would defeat his right to relief.

Harlan, Ex parte, 180 Fed. 119.

Sioux Falls v. *Marshall,* 204 U. S. 999, 45 A. L. R. 447.

Tinkoff v. *Zerbst,* 80 F. 2d 464.

Carter v. *Carter Coal Co.,* 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

U. S. v. *Three Friends,* 166 U. S. 1, 41 L. Ed. 897-913.

(g) ARGUMENT.

I.

Service of Petitioner's Four Year Term of Imprisonment to Which He Was Sentenced, Began on January 25, 1940, When in Executing the Commitment in Question, Petitioner Was Imprisoned in the County Jail at Little Rock by the United States Marshal to Await Transportation to the Penitentiary.

On January 5, 1940, Petitioner was imprisoned by the United States Marshal in the jail at Little Rock **"to await transportation to the penitentiary."** This is established by the allegations of the complaint (Rec. 4, 6) and admitted by the demurrer (Rec. 17).

By the express terms of Sec. 709a of Title 18, F. C. A., service of petitioner's sentence began at that time. The very wording of Section 709a specifically provides that

> "If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received **at such jail** or other place of detention."

This is emphasized by the following sentence:

> "No sentence shall prescribe any other method of computing the term."

Thus the provision quoted was made exclusive and no court had power to modify it.

Previous to the passage of the section quoted, courts often provided in judgments in criminal cases that service

of sentence should commence at a time prior to the tri
in order to allow defendants the benefit of imprisonme
already suffered.

In *Eyler* v. *Aderhold*, (C. C. A. 5) 73 F. 2d 372, it w
held that in sentencing a person, a judge should ta
into consideration time spent in jail awaiting trial, b
that credit for such time could not be given unless it w
expressly so stated in the commitment, but in *U. S.*
Hill, 74 F. 2d 822, the court of appeals held that the servi
of a sentence pronounced in December, 1932, commence
on the date of commitment and that a portion of the sen
tence directing that service should commence October 1
1932, was void.

To meet this condition, Congress passed Section 709a
Title 18, F. C. A. Knowing that there was often delay be
tween the issuance of the commitment after judgment i
a criminal case and the actual receipt of the prisoner a
the penitentiary, it enacted the provision that sentence
shall commence to run from the date a prisoner is **com-
mitted to a jail to await transportation** to the penitentiary.

Since that time it has been repeatedly held that serv-
ice of sentence commenced at the time of commitment to
a place of detention to await transportation to the peniten-
tiary and that after sentence had so commenced, the court
lost its power to suspend sentence or put the prisoner on
probation, or to increase sentence. It is so held in

Moss v. *U. S.*, **72 F. 2d 30.**
Trant v. *U. S.*, 90 F. 2d 718.
Mosheik v. *Bates*, 87 F. 2d 211.
Shifflett v. *Hiatt*, 50 F. Supp. 415.

In *U. S.* v. *Murray*, 275 U. S. 347-358, 72 L. Ed. 309-
315, the court said:

> "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term, to change it."

The difference between Section 709a and the pre-existing law is illustrated in *Gorovits* v. *Sartain*, 1 F. 2d 602, where defendant, under the old law, was refused credit upon his sentence for the period from November 9th to December 14th during which he was held in jail to await transportation to the penitentiary. Doubtless the Gorovits decision was influential in leading to the enactment of Section 709a.

Not only is it admitted by the demurrer that Petitioner was committed to the Little Rock jail "to await transportation" to the penitentiary, but the return of the marshal (Rec. 14) recites:

> "I **have executed** the within judgment and commitment as follows: Defendant delivered on January 25, 1940, to Pulaski County Jail at Little Rock, Ark."

Obviously the Little Rock jail was not the place specified in the commitment for imprisonment of Petitioner and the only way his delivery to that jail could have been in execution of the commitment was to deliver him there for detention to await transportation to the penitentiary.

II.

Rule V Unconstitutional and Void.

Rule V of the Supreme Court rules of practice and procedure in criminal cases (78 L. Ed. 1512, 7 F. C. A., page 431) did not have the effect of causing Petitioner's appeal to the Eighth Circuit Court of Appeals from the judgment in question to stay or interrupt the service of his sentence commenced as stated in Division I, because

(a) Said Rule V is unconstitutional and void for it embraces a matter of substantive law which could be enacted only by Congress, and conflicts with Title 18, Section 709a, F. C. A.

(b) Sec. 688 of Title 18, F. C. A.[3] empowered the Supreme Court to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict, and nothing more.

Constitution Vests All Legislative Power of the Government in Congress (Art. I, Sections 1 and 8).

That Congress cannot delegate power to legislate—to enact substantive laws—has been held so often that it is not open to dispute.

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446.

Holiday v. *Johnston*, 313 U. S. 342, 85 L. Ed. 1392.

Morrill v. *Jones*, 106 U. S. 466, 27 L. Ed. 267.

U. S. v. *United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449.

Williamson v. *U. S.*, 207 U. S. 425, 52 L. Ed. 278.

U. S. v. *Grimaud*, 220 U. S. 506, 55 L. Ed. 563.

Thus in *Panama Refining Co.* v. *Ryan, supra,* it is said that the principle that Congress cannot delegate legislative power "is universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

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[3]"The Supreme Court of the United States shall have the power **to prescribe**, from time to time, **rules of practice and procedure** with respect to any or all proceedings after verdict * * * in criminal cases in district courts of the United States.

"The right of appeal shall continue in those cases in which appeals are now authorized by law, but **the rules** made as herein authorized **may prescribe** the **times for** and the **manner** of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the **conditions** on which supersedeas or bail **may be allowed.**"

That there is a difference between substantive law and rules of procedure or practice, is equally well established.

Panama Refining Co. v. *Ryan, supra; Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208, 84 L. Ed. 196, where the burden of proof as to the *bona fide* purchaser was held to be a matter of substantive law; *Central Vermont R. Co.* v. *White,* 236 U. S. 507, 59 L. Ed. 1435, where the burden of proof respecting contributory negligence was held to be a matter of substantive law. See also *Sibbach* v. *Wilson,* 312 U. S. 1, 65 L. Ed. 479.

Boundary Line Hazy.

In *Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, it is said (page 92):

> "The line between procedural and substantive law is hazy."

In *Wayman* v. *Southard,* 10 Wheat 1, 6 L. Ed. 253, it is said (p. 44) that the boundary of the power to make, and to execute, and to construe the law "is a subject of delicate and difficult inquiry."

The courts have never undertaken to define the line between substantive and procedural law and some clarification of that subject is greatly needed.

That punishment for crime is a matter of substantive law, is so plain as to need no argument. A prisoner's right to release after he has fully served his sentence as required by law, is plainly a substantive right. So, when Congress prescribes what facts shall constitute service of a sentence for crime, that is also a matter of substantive law, and when a prisoner has performed the service required by statute, he has a substantive right to his liberty.

This is one of those matters which is so plain that no amount of argument can make it any plainer.

III.

Expressio Unius Est Exclusio Alterius.

Sec. 688 of Title 18, F. C. A., expressly provides that:

> "The rules made as herein authorized may prescribe the times for and the manner of taking appeals * * * and the conditions on which supersedeas or bail may be allowed."

and thereby impliedly withheld from the Supreme Court the power to make a rule for staying execution of the judgment in a criminal case in any way other than by **order of court allowing** bail pending appeal or by order of court recalling an outstanding commitment under which service of sentence had been commenced.

Passing the question of whether the right to bail, as held in *U. S.* v. *Hudson,* 65 Fed. 68, is a substantive right which can be prescribed only by Congress, we submit that the very wording of Section 688 quoted above, giving the Supreme Court power to prescribe by rule "the conditions on which **supersedeas or bail may be allowed**" impliedly withholds from the court the right to make a rule providing for a stay of execution of sentence in any other way.

The right to bail pending appeal is a legislative right rather than a constitutional right, so if Congress intended the Supreme Court to have power to make a rule staying execution of sentence generally, why didn't Congress say so? The rule is well settled that the statutory powers of the courts are exclusive of other powers.

The rule set out in the maxim quoted above is well settled and has been affirmed by the Supreme Court for more than a hundred years.

Thus in *Durousseau* v. *U. S.,* 6 Cranch 307, 3 L. Ed. 232-234, it is said:

"When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to **imply a negative** on the exercise of such appellate power as is not comprehended within it."

In *U. S.* v. *Arredondo*, 6 Pet. 691, 8 L. Ed. 547-560, the court said:

"'Or whenever either of the said boards shall not be satisfied that such grant, warrant or order of survey, did issue at the time it bears date, the said commissioners shall not be bound to consider such grant, warrant, or order of survey as conclusive evidence of the title, but may require such other proof of its validity as they may think proper.' Nothing can more clearly manifest the understanding of Congress that such grant, etc., was conclusive evidence of title, and that the commissioners were **not,** under the existing laws, at liberty to require from the claimants any other proof than their conferring on them by express words the power of doing so. **Expressio unius est exclusio alterius,** is an universal maxim in the construction of statutes."

In *Stephens* v. *Smith*, 10 Wall. 321, 19 L. Ed. 933-395, it is said:

"It needs no argument of authority to show that the statute, having provided the way in which these half-breed lands could be sold, by **necessary implication** prohibited their sale in any other way."

In *Raleigh and G. R. Co.* v. *Reid*, 80 U. S. 269, 20 L. Ed. 570, the Supreme Court said:

> "And this was the only way in which the property of the Company could be reached for taxation at all, for when a statute limits a thing to be done in a particular mode, it **includes a negative of any other mode."**

The maxim is referred to with approval in *Ford* v. *U. S.*, 273 U. S. 593, 611, 71 L. Ed. 793-801, 802, but in that case it was held a necessary inference from the law, that both the ship and those on board were to be subject to prosecution on incriminating evidence, and therefore the maxim was not applicable to the statute and treaty there in question.

In *U. S.* v. *Barnes*, 222 U. S. 513-521, 56 L. Ed. 291-294, the court said in substance that while the express extension of particular sections in Chapter 3 dealing with special taxes, to like taxes imposed by Section 3 of the oleomargarin act might operate as an **implied exclusion of the other sections in that chapter,** it did not restrict the operation of general sections in the other chapters.

There is nothing contrary to this rule in *Neuberger* v. *Comm.*, 311 U. S. 83, 85 L. Ed. 59, where it was said that the maxim "can never override clear and contrary evidences of Congressional intent."

In *White* v. *Burke*, 43 F. 2d 329 (C. C. A. 10th), involving the construction of an act permitting the court to grant probation before service of sentence commenced, the court said:

> "The grant of the express power to impose the lesser punishment, namely, the payment of a fine **excludes** the power to impose the greater punishment, namely, the serving of a period of imprisonment, as a condition of probation."

A late case in the Supreme Court upon this subject, is *Continental Casualty Co.* v. *U. S.*, 314 U. S. 527, 86 L. Ed. 426, where the court said (page 431):

> "Whatever may have been the powers of the courts of the United States before the statute, those powers are now regulated by statute. Cf. *United States* v. *Mack*, 295 U. S. 480, 488, 79 L. Ed. 1559, 1564, 55 S. Ct. 813. These statutory powers are exclusive. Before remission may be allowed there must be a determination of lack of willfulness in the default, that a trial can be had, and that public justice does not otherwise require the enforcement of the penalty. The statement of the conditions negatives action without the satisfaction of those requirements. Generally speaking a 'legislative affirmative description' **implies denial** of the non-described powers. *Durousseau* v. *United States*, 6 Cranch (U. S.) 307, 314, 3 L. Ed. 232, 234."

The latest case we have found on this subject is *Roberts* v. *U. S.*, 88 U. S. L. Ed. Adv. Op., p. 69, where the Court said:

> "But before we can conclude that the Act authorized the District Court thereafter to increase the sentence imposed by the original judgment we must find in it **a legislative grant of authority** to do four things: revoke probation, revoke suspension of execution of the original sentence; **set aside the original sentence;** and enter a new judgment for a long imprisonment.
>
> "* * * It is clear that power to do the first two things, revoke the probation and the suspension of sentence, is expressly granted by Section 2. It is equally clear that power to do the third, set aside the original sentence, is **not expressly granted.** If we find this power we must resort to inference."

and held it was not granted by inference.

IV.

Did the Election Referred to in the Opinion of Judge Huxman (Rec. 18) Have Any Legal Effect to Suspend the Service of Petitioner's Sentence, Neither the Statutes Nor Rules Applicable to the Case Making Any Provision for Such Election and Petitioner Having No Authority to Change the Law As to Service of Sentence Nor to Modify the Duties of the Marshal As to Executing the Commitment in Question.

Question 4 raises the question whether the so-called election had any legal effect to suspend the service of Petitioner's sentence on January 31, 1940, after he had served six days while awaiting transportation to the penitentiary.

As we understand the judgment of the lower court, it was based upon the ground that Rule V of the rules of practice adopted by the Supreme Court in criminal cases, operated **ipso jure** to stay the execution of the sentence in question at the time the appeal was taken on January 26th and that the court took the position that there was no provision of either statute or rules for an election not to commence service of the sentence, and the so-called election was nugatory (Rec. 23). The court said:

> "The situation as I understand it is the same as though he had not elected to remain in jail because he would have remained in jail, would he not? He could have elected to enter upon his service of his sentence, that would have made a difference, but as long as he did not do that there wasn't any need of him electing to remain in jail. We can forget his electing."

And at the conclusion of his opinion as dictated, he said (Rec. 33):

> "Rule V of the criminal rules of procedure by the Supreme Court provides in substance that appeal

> from a judgment of conviction stays the execution of the judgment unless the defendant pending his appeal elects to enter upon the service of his sentence. * * * In my opinion, there is no conflict between Section 709a and Rule V, but even if it be conceded that there is, Rule V prevails."

Also (Rec. 34):

> "Both Rule V and Section 709a deal with the sentence and the time when it begins to run. The Supreme Court was granted power to make rules concerning this matter and Rule V when adopted became the law because it was passed, adopted subsequent to the passage of 709a."

Obviously this Court should also regard the election as nugatory, for while Appellant did have a right to make application to the court for an order of supersedeas to stay the execution of the sentence, as held in *Hovey* v. *McDonald*, 109 U. S. 150, 27 L. Ed. 888, and the court had power to make an order to allow Appellant to remain in the county jail to assist his counsel pending decision of the appeal, as the court did do in *Demarois* v. *Hudspeth*, 99 F. 2d 274, *Smith* v. *Hiatt*, 48 F. Supp. 747, and *Dimmick* v. *Tompkins*, 194 U. S. 540, 48 L. Ed. 1110, the court **did not do so.**

He only applied to the court to be allowed bail, which the court refused. He persisted in his application for bail, making four applications to the Eighth Circuit Court of Appeals, all of which were refused (Rec. 7).

As held in *Holmes* v. *U. S.*, 126 F. 2d 432, he would have lost his right to be admitted to bail if he had elected to commence service of his sentence in the penitentiary.

That Sec. 688 of Title 18, F. C. A., implied that the court would have to make a specific order granting supersedeas and that after service of sentence had been com-

menced, would have to issue an order recalling the commitment, is apparent from *Hovey* v. *McDonald*, *supra*, where the court said:

"A supersedeas, properly so called, is a suspension of the power of the court below **to issue** an execution on the judgment or decree appealed from; or, if a writ of execution has issued, **it is a prohibition emanating from the court of appeal** against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, **an execution has been lawfully issued, a writ of supersedeas directed to the officer holding it will be necessary; but if the writ** of execution has been **not only lawfully** issued, **but actually executed, there is no remedy until the appellate proceedings are ended.** * * *"

In the case at bar, the execution or commitment had been lawfully issued and executed to the extent of putting Appellant in the county jail to await transportation to the penitentiary. Therefore a writ of supersedeas directed to the officer holding the commitment was necessary. No such writ was issued. The commitment was not recalled. Service of sentence which had commenced under the specific terms of Sec. 709a, Title 18, F. C. A., necessarily continued.

V.

Manifest Injustice.

Is adding one year and two months' imprisonment in jail to the punishment of four years in the penitentiary to which Petitioner was sentenced, so manifestly unjust and so abhorrent to an enlightened sense of justice that Congress will not be held to have intended such a result by Sec. 688, Title 18, F. C. A.?

The injustice of refusing to allow a prisoner to be released on bail pending appeal, of keeping him imprisoned for a year and two months while the appeal is pending, and then refusing to allow him credit upon the term of his sentence for such year and two months, is abhorrent to reason.

Common sense decrees it to be unfair. The universal judgment of common men would be that it was neither fair nor right nor justice.

Surely, if such procedure would be repugnant to the common citizens of this great republic, it ought to be equally repugnant to the trained minds and the refined sensibilities of its highest judicial officers.

Under *Carroll* v. *Squier*, 136 F. 2d 571, Secs. 710 and 710a of Title 18, F. C. A., became a part of Petitioner's sentence and he had a vested right to release under those sections on February 23, 1943. It was the Warden's duty to discharge him at that time. See also *Douglas* v. *King*, 110 F. 2d 911, 127 A. L. R. 1200.

In conclusion, we respectfully urge that this is not a case where Appellant escaped from the marshal or from the penitentiary. It is not a case where Appellant asked the court for an order superseding judgment, except as he asked for the allowance of bail, which was refused. It is not a case where the court made any order to stay the execution of the sentence nor to recall the commitment.

It is a case where Appellant was plainly delivered to the county jail for detention to await transportation to the penitentiary and thereby by force the statutory command, commenced service of his sentence. It is a case where the only reason why the marshal kept Appellant in the county jail for a year and two months was because the Supreme Court by Rule V undertook to stay the execution of the sentence.

Thus the continued detention in jail after appeal and refusal of bail, was due wholly to the act of the United States, for the act of the Supreme Court was the act of the official representative of the United States. Being the act of the United States, as held in *Albori* v. *U. S.*, 67 F. 2d 4, it cannot be attributed to Appellant and Appellant is entitled to credit upon his sentence for the time spent in jail. On January 24, 1944, the full four years' service of Appellant's sentence was completed and we modestly but strenuously urge that he is now entitled to and should be granted immediate and unconditional release.

Respectfully submitted,

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